Supreme Court, U. S.
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80-285

No. .....

Supreme Court of the United States

October Term, 1980

JERRY F. CHVOSTA,
Petitioner,

vs.

ALISON PIERRE AND JACK BAZIE,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Court of Appeals for the Eighth District of Ohio

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QUESTIONS PRESENTED

1. Is it equal protection under amendment 14, U.S. Constitution, to deny petitioner freedom from harassment by blacks when blacks are protected from harassment by whites? (Referred to in daily media as reverse discrimination.)

2. Does the right of blacks to live where they please include the right to harass whites into "white flight"?

3. Did the city police department deny petitioner the equal protection of law in not taking appropriate action and prosecution of black harassers of a 36-year white resident to avoid being accused of racial discrimination by the N.A.A.C.P.?

4. Did certain police officers take a negative attitude regarding petitioner's rights because he complained to their superiors regarding their misfeasance and nonfeasance?

5. As found by this court in the *Bakke* case, 438 U.S. 265, 57 L. Ed. 2d 750, is there a parallel here in too much affirmative action for blacks and a decrease in equal protection for whites?

6. Is it a denial of due process for the arresting officer to lie down at the feet of petitioner in the arresting act with his partner and then report to the news reporter that petitioner struck him, which was then printed in newspapers?

7. Is it a denial of due process of law when persons in privity with the respondents made person to person threats to prospective witnesses for petitioner, ("if you're going to stick up for him you better move"), with the result that not one was willing to testify in petitioner's behalf regarding acts of harassment toward him and his good character?

8. Is it denial of due process for the police department to re-enact the incident for TV cameras the next morning entirely on plaintiff's version of the shooting without petitioner or his attorney present and showing said version on TV several times?

9. Is it a denial of due process of law and equal protection to take from the jury the weighing of facts of self-defense as petitioner's first affirmative defense?

10. Is it a denial of due process of law and equal protection for the trial judge to take from the jury the consideration of assumption of risk by respondents as petitioner's second affirmative defense?

11. Is it a denial of due process of law for the court to find petitioner guilty of negligence without letting the jury consider that question on the facts presented? Did the court usurp the province of the jury as the trier of the facts?

12. Is it due process of law and equal protection for the trial judge to set trial date and hold court just 2 weeks prior to his being up for re-election knowing that his denial of due process to petitioner would assure a plurality of black votes due to favorable publicity in a black-owned and circulated newspaper?

13. Is it due process of law and equal protection for the courts to accept the respondent's perjured testimony and that of her witnesses in fabricating a story of their activity when the facts indicate a course of action whereby they were harassing petitioner?

14. Is it due process of law and equal protection for the trial court to hold that self-defense and accident cannot be concurrent when the testimony showed that it can be?

15. Is it due process of law and equal protection for the trial court to disregard that Petitioner was on his own property and was therefore acting in self-defense while Respondent was away from her home several hundred yards, armed with a stick and attacking Petitioner instead of avoiding him?

16. Is it not well established that a man's home is his castle and he has a right to defend it and himself while thereon, thereby acting in self-defense?

17. A recent Ohio Court of Appeals held unconstitutional the burden of proof on Defendant to establish self-defense, thereby providing another self-defense question; is it not appropriate for this court to issue the writ and consider the self-defense aspects of this case?

18. In a racially changing neighborhood is it not equal protection for a long-time resident to defend himself against a gang of aggressors interfering with his yard chores?

19. Is it due process of law and equal protection for the F.B.I. to refuse to investigate the racial aspects of harassment of Petitioner?

20. Is it due process of law and equal protection for Petitioner's white attorney to withhold from his white client that he is a life member of the N.A.A.C.P. knowing that he cannot serve two masters?

21. Is it due process of law and equal protection for Petitioner's attorney to refuse to file a counter-claim in order to bring the case into the realm of *mutual combat* common law whereby many litigants have been denied damages from either side?

22. Is it due process for Petitioner's attorney to engage in token-level cross examination of the arresting officers

because he is an attorney for the police association and thereby failed to establish that the officer lied when he testified that he read Petitioner the rights required by the *Miranda* decision?

23. Is it due process for the trial court to negate Ohio case law, which denies punitive damages due to mitigating circumstances, by holding Petitioner negligent and submitting to the jury the question of damages only?

24. Is it due process for Petitioner's attorney to fail to object, enter objections and enter proffers into the record as pointed out in the Court of Appeals Review of the assignments of error?

25. Is it due process of law and equal protection for Petitioner's attorney to refuse to appeal to higher courts and thereby force him to act as his own attorney?

26. Is it due process of law and equal protection for the trial court to deny Petitioner's testimony to a threat by the leader of the gang that she would return with a gun?

27. Due to the TV re-enactment, the extensive TV and newspaper coverage of the incident, is it due process of law for the attorney for Petitioner to not ask for change of venue?

28. Is it due process of law for the court to permit Respondent's attorney to first put Petitioner on the witness stand in cross-examination without first making out his case by direct examination of Respondent?

29. Is it due process of law for the opinion writing appellate judge to do so in the same year that he is up for re-election, thereby gaining the black vote?

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Supreme Court of the United States

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JERRY F. CHVOSTA,
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To the Court of Appeals for the Eighth District of Ohio

OPINIONS BELOW

The Judgment Entry of the Cuyahoga County Court of Common Pleas dated October 23, 1978 is printed in the Appendix herein.

The Journal Entry and Opinion of the Court of Appeals of Ohio for Cuyahoga County, Case No. 401[illegible]7 is printed in the Appendix herein.

The Judgment of the Supreme Court of Ohio dismissing the appeal is printed in the Appendix herein.

JURISDICTION

The Order of the Supreme Court of Ohio dismissing petitioner's appeal from the Court of Appeals for Cuyahoga County and overrule of appellant's Motion for an order directing said Court of Appeals to certify its record was

made and entered on May 29, 1980 and Notice of Appeal was filed on June 27, 1980 with copy thereof to opposing counsel.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) and timely filed within the required 90 days.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . ."

Constitution of Ohio:

Article I, Section 1 of the Ohio Constitution guarantees citizens their right to protect their property.

Article I, Section 16 is entitled Redress in Courts: "All Courts shall be open and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due process of law, and shall have justice administered without delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

Article I, Section 19, Private Property Inviolate, Exception: "Private property shall ever be held inviolate but subservient to the public welfare. . . ."

STATEMENT OF THE CASE

Petitioner Jerry F. Chvosta (hereinafter referred to as Chvosta) resided at 16721 Lomond Blvd. in Shaker Heights, Ohio for thirty-six (36) years. During the four (4) or five (5) years prior to June 21, 1976, Chvosta began receiving harassment from certain neighborhood teenagers. Eggs were thrown at his house. Destruction was done to his property. Several times there were threats of bombing his house or bodily shooting him.

Chvosta's response each time was to call the Shaker Heights Police Department and to complain. On June 15, 1976 Chvosta requested a special meeting with Lt. Holowenko in charge of the juvenile unit of the Shaker Heights Police Department to complain about the threats that were made against him.

The harassment continued while Chvosta was disposing of a dead elm tree and replacing a maple tree in his front yard. Two boys, J. Kevin Newbill and Kevin Freeman were the main instigators of activity against Chvosta.

On June 21, 1976, Chvosta was in his front yard on Lomond Blvd. cutting the grass with a power mower. Five teenagers, three of them appeared to be girls and two appeared to be boys, came down the driveway at 16801 Lomond and lingered in front of Chvosta's house about 8:30 P.M. They shouted at Chvosta but he ignored them, intent on minding his own business. He wasn't bothering them as they fantasized. They were bothering him with their leader, Sandra Williams, who wore light blue slacks and blouse, as aunt of the Solomon girls. Having been ignored, they gave up and left within a minute.

Chvosta finished cutting the front lawn and returned his power mower to his garage. He then proceeded to the front again to pick up twigs, trash and hand-pull clumps of grass not consumed by the mower. The time was close to 9:00 P.M. and as he came down his driveway and into the clearing between houses, he saw that they were coming back across the street.

Wishing not to confront them at close range he turned and went to his front door step to wait until they passed. When they got to the sidewalk in front of Chvosta's house they stopped and the 19-year old aunt in light blue slacks shouted "We can walk on your lawn all we want and you can't do anything about it." They appeared to be the same five (5) girls and boys who shouted at him about 8:30 as he was mowing the front lawn.

Chvosta replied "But I have to maintain it and I'm trying to make it look nice". To avoid shouting he slowly approached them down the 16725 driveway next door to his. The 19-year old aunt Sandra Williams repeated "We can walk on your lawn all we want and you can't do anything about it". By this time Chvosta had reached a normal conversation distance from them and Sandra Williams held a full-size brick to within six (6) inches of Chvosta's face and said "If you try to stop us you're going to get hit", at which time Chvosta saw that Alison Pierre, standing at Sandra Williams' left elbow, was holding a stick behind her back, Sheila Solomon was at Sandra Williams' right elbow holding up a three-quarter size brick. Angela Gray stood behind Sheila Solomon and Monica Hardy to Angel's right with an object in her hand.

Then Sandra Williams said "The next time we meet I'm going to have a gun, there is going to be a shootout and one of us will be dead". Chvosta replied "But I'm 56 years old" and not wishing to prolong a useless argu-

ment he turned and went to his backyard hoping that they would go away so he could do his work.

The group of five proceeded to 16801 Lomond to the Newbill home and four of them walked back toward Lindholm. After waiting as long as 10 minutes he decided to return to finish his front work. But, he feared that they would return with a gun as Sandra Williams had threatened so he decided to take along his shotgun, intending to lay it down at his side as he worked on his hands and knees.

Halfway down his main lawn he heard Bernard Hardy, sitting on the front step at 16801 Lomond, shout "He's out there again". At the same time Chvosta saw the group of five in conversation on the corner of Lomond and Lindholm. Chvosta recalled that Kevin Newbill had said that his father threatened to shoot Chvosta so he placed himself to the west of a pine tree to observe what the five were going to do; go away or come back. They immediately started across Lomond directly toward him, carrying bricks and large sticks and Sandra Williams appeared to be holding a gray object to her bosom which Chvosta assumed was a gun. As he backed into the pine tree his feet were slipping on the roots and mulch. He was preparing to cock the gun to possibly fire a warning shot into the neighbor's main lawn when it accidently discharged.

Two of the girls were hit by the shotgun pellets. Shaker Heights Police were called and Chvosta surrendered to them.

Trial was held before the Honorable Judge Francis E. Sweeney beginning on Oct. 16, 1978 and ending on Oct. 19, 1978 before a jury of eight (8) men and women.

The testimony showed that the girls had fabricated a story of being at a house at 3698 Lindholm, occupied by

Mr. and Mrs. Alexander Solomon, Jr., parents of Sheila, Bridget and Pamela Solomon and the temporary home of the children's aunt, 19-year old Sandra Williams, visiting from Birmingham, Alabama. They testified that a meeting at 3698 Lindholm lasted from 7:00 to 9:00 P.M. which could not be true as they first walked past Chvosta while he was mowing his front lawn at 8:30 P.M.

An officer of the Shaker Heights Police Department informed Chvosta that when statements were being taken at the station on the evening of the shooting, the parents did all the talking, thereby putting the first words of fabrication to the children.

A comparison of the testimony in the criminal case and this civil case record will show conflicting, inconsistent and reversed accounts of the girls and their witnesses.

When plaintiff's attorney realized that the testimony was no longer consistent, he rested his case without calling other witnesses subpoenaed who would additionally expose fabricated testimony entirely at variance with probable facts.

The Court sided with plaintiff in sustaining a Motion in Limine, thereby denying Chvosta his affirmative defenses of self-defense and assumption of risk by plaintiff.

From the errors of the Trial Court and the jury award Chvosta appealed to the Court of Appeals, Eighth Appellate District. The Court of Appeals affirmed the judgment, but cited several instances of passive conduct by Chvosta's attorneys in not entering timely objections, exceptions and proffers into the record.

The petitioner Chvosta then filed a Notice of Appeal and Memorandum in Support of Jurisdiction to the Supreme Court of Ohio, case No. 80-652, which refused jurisdiction on May 29, 1980.

On June 26, 1980 petitioner Chvosta filed a Notice of Appeal to the United States Supreme Court with copy to counsel for appellees.

The stages in which the federal questions were raised appear in the record of the Trial Court's conduct of the case, in briefs, oral argument to the Appellate Court and in the opinion of the Trial Court.

REASONS FOR ALLOWING THE WRIT

1. Petitioner is entitled to review of his case by an impartial tribunal not subject to elective office and therefore the votes of an overwhelming minority which had achieved racial superiority over petitioner's neighborhood by which he became the minority.

2. Having achieved 50 to 75% racial superiority the blacks proceeded to harass petitioner to make him unhappy in the area, force him to move and thereby cause more blacks to move into the neighborhood so they could take it over completely.

3. Petitioner, a lawyer and engineer accepted the blacks into the area, admonished them from his lawn when fertilizer was spread and reported their wayward conduct to the police, for this they harassed him and therefore they should not be allowed to profit by their harassing conduct.

ARGUMENT

When a person has a bona fide belief that he is in immediate danger of great bodily harm as a result of the threatening conduct of a group of assailants, that person is justified on the ground of self-defense in assaulting the assailants.

A fair interpretation of the overwhelming testimony in this case can lead to but one conclusion: that Chvosta was not negligent by reason of his acting in self-defense.

The law of self-defense was duly summarized in *State v. Lovejoy*, 48 Ohio Misc. 20, 21 (1976) as follows:

> "* * * In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property, against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable." Foster's Crown Cases, Ch.3, Pg. 273 et seq. (1762)
>
> "Where a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it is in his power to do so without increasing his danger, may kill his assailant if necessary to save his own life or prevent enormous bodily harm." *Erwin v. State* (1876), 29 Ohio St. 187.
>
> "* * * a true man, who is without fault, is not obliged to fly from an assailant, who, by violence or

surprise, maliciously seeks to take his life or do him enormous bodily harm." Judge McIlvaine in *Erwin v. State*, supra, at page 199; *State v. Blanton* (1960), 111 Ohio App. 111, 116.

An assault is justifiable on the ground of self-defense, where the defendant in the careful and proper use of his faculties, bona fide believes, and has reason to believe that he is in imminent danger of great bodily harm, and that his only means of escape from that danger will be by exerting such force as may even take the life of his assailant, although *in fact* he is mistaken as to the existence or imminence of the danger. *Marts v. State*, 26 Ohio St. 162 (1875).

The test therefore relates to the *actual* state of mind of the defendant and its bona fide or good faith, and whether such state of mind is on reasonable grounds. The question is not whether the actions were reasonable as to the reasonable man, but whether the acts were reasonable as to the defendant. The test does *not* relate to what should be, but may not be, apparent to the defendant. See *State v. Reid*, 3 Ohio App. 2d 215, 32 Ohio Op.2d 316, 320 (1965); *State v. McLeod*, 82 Ohio App. 155, 37 Ohio Op. 522 (1948); *State v. Clifton*, 32 Ohio App. 2d 284, 61 Ohio Op.2d 348 (1972).

In relation to the defense of one's property, where one is assaulted in one's home, he may use such means as are necessary to repel the assailant from his home or to prevent material injury to his home. *State v. Peacock*, 40 Ohio St. 333 (1883).

On the night of June 21, 1976, Chvosta was in the lawful pursuit of the quiet possession of his habitation, as he had been for thirty-six (36) years. But built up inside him was the anxiety caused by a changing neighbor-

hood with a rash of threats and harassment from neighbors and area teenagers. In a frightened state, and after having received a threat on his life. Chvosta took protection with him in the form of a shotgun as he endeavored to finish his yard work that evening. When the group of teenagers came upon him with bricks and long wooden boards (all capable of inflicting serious bodily injury), he backed into a tree in his front yard to observe the assailants. By his own words, he stated the gun accidently discharged as he was about to fire a warning shot. No other evidence refuted his testimony. The weight of the evidence demonstrates that Chvosta acted in self-defense. In the good faith state of mind of Jerry Chvosta, he was afraid that serious bodily harm would result to him.

It is hereby stated from the Ohio Constitution, Article I, Bill of Rights: I §1 - Inalienable Rights:

> "All men are by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring possession and protecting property, and seeking and obtaining happiness and safety."

Also from the Ohio Constitution, I §10 - Trial for Crimes, Witness:

> "* * * and to have compulsory process to procure the witnesses in his behalf. . . ."

This was denied Chvosta because of threats to friendly neighbors. "If you are going to stick up for him you better move."

Also see the Ohio Constitution, I §19 - Private Property Inviolate, Exception: (Eminent Domain).

Yet one month after the shooting incident, Chvosta's house was broken into while Chvosta was not at home.

When a person is engaged in an altercation with more than one person, it is not the use of greater force than necessary when he overcomes the force of their individual weapons in defending himself against their combined weapons.

In *State v. McLeod,* 82 Ohio App. 155, 80 N.E.2d 699 (1948) it was stated that:

> "In general, every man has the right to defend himself and his property by the use of such force as the circumstances require to protect himself against such danger as he has good reason to apprehend, and the measure of that force depends upon the nature of that assault taken together with all other circumstances, such as the physical disparity between the parties here, and it is only when one uses a greater degree of force than is necessary under *all the circumstances* that it is not justifiable on the ground of self-defense.
>
> The law does not require of the defendant any nice distinction as to the least amount of force necessary, but whether the force used was excessive or not is a question for the trier of the facts under proper instruction.
>
> Evidence of threats is admissible on the issue of self-defense".

In the case at bar the Court usurped the function of the jury in removing from the jury's consideration the issue of self-defense.

In holding that Chvosta was negligent the Court took away from the jury its function as the trier of the facts above.

In taking away from the jury the consideration of contributory negligence or assumption of risk, the Court

denied the consideration of the jury as to the measure of force in the hands of the attacker juveniles and their leader Sandra Williams, and the force of self-defense in the hands of Chvosta.

CONCLUSION

In light of the due process clause and the equal protestion clause of Amendment 14 of the United States Constitution and Article I, Sections 1, 10 and 19 of the Ohio Constitution, this is a prime case for review by the Supreme Court of the United States.

A peaceful man lives in a peaceful neighborhood for thirty-six (36) years. Then over the past ten or fifteen years the area changes. Chvosta was looked to, as a senior resident, to help keep the neighborhood peaceful by reporting suspicious and uncivil behavior of pseudohoodlums to the police. These characters engaged in harassment of Chvosta and death threats were made. Under these circumstances, it can only be said that Chvosta acted reasonably when he obtained his shotgun as protection while intent of doing his front lawn work as he had done for some thirty plus years.

Over the past years Chvosta reported to the police of the activity requested by police to be reported. Yet because of the changing neighborhood the police preferred to keep a low profile.

Now we have a classic case of reasonable conduct whereby Chvosta

(a) informed the police of harassment and,

(b) retreated from the first confrontation while mowing and,

(c) retreated again when confronted with bricks and sticks when attempting to clean up his mowing debris, and

(d) was forced to defend himself in the third confrontation, whereupon an accidental shooting occurred.

It is obvious that they were the aggressors and should not be rewarded with an excessive money judgment for their act. It can be said that encouraging their children to harass a man of means so that he can be sued beats sending them out to rob banks on a 100 to 1 escalation. This profit should be denied to them.

Petitioner Jerry F. Chvosta, respectfully requests that this Honorable Court sustain his Petition for Writ of Certiorari.

Respectfully submitted,

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Petitioner

APPENDIX

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 23, 1978)

Case No. 962,621

COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALISON PIERRE, *et al.*,
Plaintiff,

vs.

JERRY F. CHVOSTA,
Defendant.

Jury verdict for plaintiff, defendants costs, $75,000.00 actual damages plus $75,000.00 punitive.

/s/ F. SWEENEY
Judge

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Dated March 6, 1980)

No. 40157

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

ALISON PIERRE, *et al.*,
Appellees

vs.

JERRY CHVOSTA,
Appellant

JOURNAL ENTRY AND OPINION

PARRINO, *J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On November 9, 1976, appellee, Alison Pierre, by and through her next friend and guardian, instituted an action for assault and battery and negligence in the Cuyahoga County Common Pleas Court by filing a complaint against appellant, Jerry Chvosta. The complaint alleged that at approximately 9:00 p.m. on June 21, 1976, appellee was walking along the sidewalk near appellant's property

at 16721 Lomond Boulevard in Shaker Heights when appellant intentionally fired a shotgun blast at her, striking her in the chest, neck, face, and shoulder. The complaint further alleged that appellant acted in a reckless and negligent manner, and that as a result, appellee sustained permanent and disfiguring injuries, suffered pain, and incurred expenses for medical care. Appellee sought compensatory damages in the amount of $150,000 and punitive damages in the amount of $500,000.

Appellant filed an answer in which he admitted that at approximately 9:00 p.m. on June 21, 1976, appellee was in close proximity to his property and that a shotgun was fired. Appellant denied the remaining allegations contained in appellee's complaint. In addition, appellant set forth the affirmative defenses of self-defense and contributory negligence.

Trial commenced before a jury on October 17, 1978. After the jury was impaneled, appellee made a motion *in limine,* requesting the court to prohibit appellant from referring during opening argument to a statement allegedly made by a teenage girl to appellant on June 21, 1976, to the effect that the next time they met, she was going to have a gun and there would be a shoot-out. The court granted the motion over the objection of appellant.

At trial, the evidence established the following: During the years 1972-1976, appellant, who lived at 16721 Lomond Boulevard in Shaker Heights, experienced harassment from area teenagers. At approximately 9:00 p.m. on June 21, 1976, appellant was cutting his front lawn when four neighborhood teenage girls, Pamela Solomon, Sheila Solomon, Sandra Williams, and Monica Hardy, walked by on their way to Monica Hardy's house at 16801 Lomond Boulevard. Appellant and the girls became involved in an argument.

Witnesses gave conflicting accounts of the circumstances surrounding the argument. Monica Hardy testified that appellant approached the girls and accused them of walking on his lawn. She further related that the girls denied the accusation and that the argument ensued. Appellant testified that the girls stopped in front of his house and that Sandra Williams shouted, "We can walk on your lawn all we want and you can't do anything about it." Appellant added that he moved closer to the girls and observed that they were holding bricks and sticks. Appellant further stated that Sandra Williams repeated her previous comment, brandished a brick within a few inches of his face, and declared, "If you try to stop us, you're going to get hurt."

The argument ended when Monica Hardy's aunt summoned Monica to come home. Monica Hardy's house was located two houses east of appellant's residence, on the same side of the street. The remaining three girls headed west on Lomond Boulevard toward Lindholm Road. Appellant retreated to his back yard.

Appellant entered his garage and obtained a shotgun which he promptly loaded. With the gun in hand, appellant returned to his front yard and hid underneath a large pine tree.

In the meantime, Pamela Solomon, Sheila Solomon, and Sandra Williams encountered three friends, Paula Cox, Angela Gray, and appellee, Alison Pierre, at the corner of Lomond Boulevard and Lindholm Road. The girls engaged in conversation, and Sheila Solomon and Sandra Williams informed the others of the quarrel with appellant. According to the testimony of Paula Cox, Angela Gray, and appellee, the girls decided to go to a nearby Baskin Robbins Ice Cream Store and to pick up Monica Hardy on the way.

With the exception of Pamela Solomon, who stayed at the corner of Lomond Boulevard and Lindholm Road, the girls proceeded east on Lomond Boulevard in the direction of Monica Hardy's house, walking on the side of the street on which Monica Hardy's house was located. Sandra Williams carried a brick and at least two girls carried sticks. Paula Cox testified that the items were for defense purposes in the event of a confrontation with appellant.

When the girls were approximately seventy feet from the pine tree situated on appellant's front lawn, a shot rang out from the vicinity of the tree. Shotgun pellets struck appellee, wounding her.

Shortly thereafter, several Shaker Heights police officers arrived at the scene and arrested appellant, who was still underneath the pine tree. Appellant told one of the officers, "They came at me with bricks and rocks and I had to get even with them."

At trial, appellant maintained that his shotgun discharged accidentally. He testified as follows:

> THE WITNESS: I had to change my plan of putting the gun down and continuing my yardwork, and I then took cover by backing into the pine tree to observe what was going on, because I noticed that the girls were starting to come around the corner at Lindholm towards my direction.
>
> Q. What's the next thing you remember, Mr. Chvosta?
>
> A. I remember seeing Sandra Williams carrying something to her busom like this, and recalling the previous threats and seeing that the bricks and sticks and I wanted to fire a warning shot into the neighbor's lawn to let them know that I was armed be-

cause I didn't want to hurt them. So, as I swung the gun around, it discharged accidentally.

Q. What happened then?

A. I realized what had happened and I was shocked at the fact that the gun had gone off and so, I realized that the only thing I could do is sit there and wait until or stand and wait until the police came, which I did. (Tr. 287.)

At the close of appellee's evidence, appellant moved for a directed verdict as to the issue of proximate cause. The court overruled the motion.

At the conclusion of appellant's opening statement and again at the close of all the evidence, appellee requested the court to strike the affirmative defense of self-defense and to direct a verdict for her as to the issue of liability. At the close of all the evidence, the court granted both requests. In addition, the court earlier withdrew the affirmative defense of contributory negligence from the consideration of the jury.

In its charge to the jury, the court stated as follows:

The Court has directed a verdict on the matter of law that the defendant was negligent and his negligence was the proximate cause of the injuries complained of.

The Court further finds that as a matter of law, the defendant assaulted the plaintiff and that said assault was also the direct and proximate cause of the injuries complained of by the plaintiff. Your verdict must be for the plaintiff and the Court instructs you to award the plaintiff actual damages that she is entitled to receive from all of the evidence which will fully, fairly and wholly compensate for the injuries she received. (Tr. 376.)

The jury awarded appellee compensatory damages in the amount of $75,000 and punitive damages in like amount.

Appellant timely filed a notice of appeal. Twelve errors have been assigned:

I. PLAINTIFF'S ATTORNEY WENT BEYOND THE BOUNDS OF CLOSING ARGUMENT IN ARGUING DEFENDANT'S OATH OF OFFICE.

II. THE COURT ERRED IN ALLOWING PLAINTIFF'S ATTORNEY TO GO BEYOND THE EVIDENCE IN HIS CLOSING ARGUMENT.

III. THE COURT ERRED IN SUSTAINING THE OBJECTION TO THE TESTIMONY OF LT. KOHANSKI[sic] THE INVESTIGATING OFFICER.

IV. THE COURT ERRED IN REASONING THAT SELF-DEFENSE AND ACCIDENT CANNOT BE CONCURRENT.

V. THE COURT ERRED IN ORDERING DEFENDANT ON PLAINTIFF'S MOTION IN LIMINE TO REFRAIN FROM TESTIFYING TO SANDRA WILLIAMS THREAT.

VI. THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

VII. THE COURT ERRED IN WITHDRAWING FROM THE JURY THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

VIII. THE COURT ERRED IN WITHDRAWING FROM THE JURY, DEFENDANT'S FIRST AFFIRMATIVE DEFENSE OF SELF-DEFENSE.

IX. THE COURT ERRED THAT THE DEFENDANT ACTED NEGLIGENTLY AND THAT HIS NEGLIGENCE WAS THE PROXIMATE CAUSE OF INJURY TO PLAINTIFF.

X. THE COURT ERRED IN ITS CHARGE TO THE JURY THAT DEFENDANT ASSAULTED PLAINTIFF AND SUCH ASSAULT WAS THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES.

XI. THE COURT ERRED IN FINDING FOR THE PLAINTIFF AND SUBMITTING TO THE JURY THE AMOUNT OF DAMAGES ONLY.

XII. THE COURT ERRED IN BELIEVING THE FABRICATED AND PERJURED TESTIMONY OF PLAINTIFF AND HER WITNESSES.

Since the first and second assignments of error are concerned with the closing argument made by appellee's attorney, we are addressing them together.

It is a basic proposition of law that an appellate court will not consider a claim of error where the alleged error was not brought to the attention of the trial court by a timely objection. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St. 2d 41.

In the instant case, appellant failed to object to the statements made by appellee's attorney during closing argument. Therefore, this Court will not consider the first and second assignments of error on the merits.

Regarding the third assignment of error, it is well settled that when a trial court sustains an objection to a question, a statement must be made or proffered as to what the expected answer would be in order that an appellate court can determine whether or not the

action of the trial court is prejudicial, and in the absence of a proffer, the exclusion of evidence may not be assigned as error. *Pokorny v. Local 310* (1973), 35 Ohio App. 2d 178, rev'd on other grounds, 38 Ohio St. 2d 177.

In the case at bar, appellant posed the following question to Detective Tom Kohansek on cross-examination: "And you learned from Sandra Williams that she had an object in her hand at the time of the shooting, did you not?" Appellee objected to the question on hearsay grounds, and the court sustained the objection. Appellant did not proffer the expected answer into the record. Thus, appellant may not assign as error the trial court's act of sustaining the objection to the question asked of Detective Kohansek.

Accordingly, the third assignment of error is not well taken.

With respect to the fourth assignment of error, the Ohio Supreme Court has held that self-defense and accident are inconsistent defenses. *State v. Champion* (1924), 109 Ohio St. 281.

In the present case, the following colloquy between the court and appellant's attorney took place at the close of appellee's case:

> MR. WEINBERGER: I think it's premature to direct a verdict on the issue of self-defense until he testifies in our case in chief.
>
> THE COURT: But you just said your man was going to testify, and he is going to say it was an accident.
>
> MR. WEINBERGER: Well—
>
> THE COURT: Don't you know what he is going to say?

MR. WEINBERGER: I am not exactly sure, Judge.

THE COURT: He certainly said accident on cross.

MR. WEINBERGER: Yes, he did.

THE COURT: Self-defense is confession of a [sic] avoidance, yes, I shot the man and I intended to shoot but I was fearful of my own life. He said, he didn't shoot the gun, that it went off. I assume, he said it went off. The only way it can go off, I assume, is by accident. So himself on cross had already said, he did not shoot the gun that it went off accidentally.

Is he going to say something different now on direct, no, he didn't shoot accidentally but he shot in self-defense?

MR. WEINBERGER: Judge, I think that, I guess, I am asking the Court to hold ruling on this in abeyance until the Court hears the defendant testify again mainly because it's my feeling that the defendant may well testify that he went and got the shotgun, that he felt that he was acting in self-defense and when he backed into the tree, he felt he was acting in self-defense but that the gun accidentally discharged before any further actions could be taken.

THE COURT: I assume it's going to be self-defense and accident?

MR. WEINBERGER: Yes, Judge.

THE COURT: Which I think is impossible, it's either got to be one or the other.

I will hold in abeyance any ruling on a motion as far as direction and/or eliminating any affirmative

> defenses in consideration of the jury, and rule on those after all of the evidence is in. (Tr. 262-264.)

Under the rationale of *State v. Champion, supra,* the trial court did not err in concluding that the defenses of self-defense and accident are mutually exclusive.

The fourth assignment of error is without merit.

Turning to the fifth assignment of error, a motion *in limine* is defined as follows:

> [A] precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury. *State v. Spahr* (1976), 47 Ohio App. 2d 221 (Syllabus ¶ 1).

In the present case, the court granted appellee's motion *in limine* and ordered appellant to avoid reference in his opening argument to a certain statement allegedly made by a teenage girl to appellant on June 21, 1976. Neither appellee nor appellant requested a subsequent ruling on the admissibility of the statement. In view of the parties', especially appellant's, failure to request a further ruling and in view of the legal principle that opening statements are not evidence, the granting of the motion *in limine,* if error at all, constituted harmless error.

The fifth assignment of error is overruled.

Focusing on the sixth assignment of error, it is well established that no error may be predicated on a trial court's denial of a defendant's motion for a directed verdict made at the close of the plaintiff's evidence where the record reflects that the defendant presented evidence on his own behalf and failed to renew the motion for

a directed verdict at the close of all the evidence. *Ferrebee v. Boggs,* (1970), 24 Ohio App. 2d 18.

In the instant case, appellant moved for a directed verdict at the conclusion of his opponent's evidence. The trial court overruled the motion, and appellant proceeded to introduce evidence on his behalf. Appellant did not renew his motion at the close of all the evidence. Therefore, appellant may not assign as error the trial court's denial of his motion for a directed verdict.

The sixth assignment of error is not well taken.

Concerning the seventh assignment of error, it is well settled that an individual cannot recover for injuries occasioned by negligence, where he has himself also been guilty of negligence which contributed to the result. *Bellefontaine & Indiana Railway Co. v. Snyder* (1868), 18 Ohio St. 399.

In the case at bar, the record is devoid of evidence to show that appellee was guilty of contributory negligence on the evening of June 21, 1976. Accordingly, the trial court did not err in withdrawing the affirmative defense of contributory negligence from the consideration of the jury.

The seventh assignment of error is without merit.

With respect to the eighth assignment of error, the affirmative defense of self-defense has no application in a case where the record is devoid of evidence to demonstrate that the defendant, out of concern for his safety, intended to shoot the plaintiff, or that the plaintiff committed an overt act by which the defendant could reasonably believe that he was in imminent danger of great bodily harm or death. *State v. Rogers* (1975), 43 Ohio St. 2d 28, *cert. denied,* 423 U.S. 1061. In the instant case, the record does not contain any evidence to show that

appellant intended to shoot appellee. Appellant himself testified that he did not want to hurt appellee and her friends, that he wanted to fire a warning shot into a neighbor's lawn in order to let the girls know that he was armed, and that his shotgun discharged accidentally. Furthermore, there is no evidence tending to show that appellant could have reasonably believed that he was in imminent danger of great bodily harm or death, as it is undisputed that appellant hid underneath a pine tree and was not visible to the approaching girls and that the girls were seventy feet from the pine tree at the time the shotgun was fired. Since the evidence does not support a claim of self-defense, the trial court did not err in withdrawing the defense from the consideration of the jury.

The eighth assignment of error is overruled.

Since the remaining assignments of error are interrelated, we are considering them together.

Civil Rule 50(A)(4) provides:

> When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

We have carefully reviewed the record in the instant case and conclude that the trial court properly directed a verdict for appellee as to the issue of liability. The record conclusively demonstrates that appellant assaulted appellee and was guilty of negligence and that the assault

and negligence were the proximate cause of appellee's injuries. The only issue remaining for resolution by the jury was that of damages. The court instructed the jury accordingly.

The ninth, tenth, eleventh, and twelfth assignments of error are not well taken.

Accordingly, the judgment is affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ THOMAS J. PARRINO
Judge

PATTON, *P.J.*,
CORRIGAN, *J.*, concur.

JUDGMENT ENTRIES OF THE OHIO SUPREME COURT

(Dated May 29, 1980)

No. 80-652

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

ALISON PIERRE, *et al.*,
Appellees,

VS.

JERRY F. CHVOSTA,
Appellant.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the Appeal for the reason that no substantial constitutional question exists herein.

It is further ordered by the Court that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for Entry.

No. 80-652

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

ALISON PIERRE, *et al.*,
Appellees,

vs.

JERRY F. CHVOSTA,
Appellant.

Motion for an order directing the Court of Appeals for Cuyahoga County to certify its record.

It is ordered by the Court that this motion is overruled.

Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-285

Supreme Court of the United States

October Term, 1980

JERRY F. CHVOSTA,
Petitioner,

vs.

ALISON PIERRE AND JACK BAZIE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT CUYAHOGA COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

It should be obvious from a cursory reading of Petitioner's Brief that there are absolutely no constitutional issues involved in this case. This is simply a case of ordinary common law negligence. For that reason alone, this Petition should be denied.

The jury in this case returned a verdict awarding both compensatory and punitive damages against Petitioner for conduct which any reasonable person would consider barbaric and outrageous. The evidence in support of this

verdict and the various rulings of the Trial Court are so clear and beyond reasonable doubt that a concise synopsis of the evidence in this Record will, we believe, sufficiently answer the points raised in Petitioner's Brief.

The Court will note that the Petitioner appears in this Court without counsel, although he was represented by experienced, competent trial counsel throughout the trial of this case. His Memorandum is so factually inaccurate as to warrant the appellation of being outrageous in its misstatements of events, testimony, statements, purported exhibits and documents that a point by point reference to these unsupported allegations could further the Petitioner's obfuscating tactics.

Accordingly, counsel for Respondent hereby states professionally that the following is an accurate synopsis of the evidence in this case.

COUNTER STATEMENT OF THE CASE

On June 21, 1976, Petitioner suddenly and without any warning whatsoever discharged a 16 gauge shotgun blast into the face and upper body of Alison Pierre—a 14 year old girl who was walking on the sidewalk *one house west* of Petitioner's property. Petitioner fired the shotgun from his front lawn, a distance of almost 70 feet. This attack with a deadly weapon was malicious and unwarranted.

Petitioner's conviction of two counts of Felonious Assault was previously upheld by the Ohio Supreme Court. On June 26, 1980, he was indefinitely suspended from the practice of law by the Ohio Supreme Court. This action went to trial on three separate and distinct claims for relief, to-wit:

(1) Negligence;

(2) Willful and wanton misconduct in reckless disregard of Appellee's rights and safety, and

(3) Assault and battery.

At the close of all the evidence, the Trial Court sustained Respondent's Motion for a Directed Verdict on the issues of negligence and assault and battery and submitted to the jury the issues of compensatory and punitive damages. The jury found for Respondent on both issues.

COUNTER STATEMENT OF FACTS

During the five year period immediately preceding the incident in question, Petitioner experienced a few unrelated incidents of what he terms "harassment" from neighborhood children. These were incidents such as *boys* stealing apples from his apple tree; two years later he discovered three eggs thrown against his house; once in 1975, a neighborhood *boy* let his dog do his "business" on his front lawn; in May of 1976, some neighborhood *boys* were calling him names while he was cutting a tree stump from his front yard. On each of these four instances, Petitioner called the Shaker Heights Police Department and reported the *boys*.

On the evening of June 21, 1976, a group of junior high and high school *girls,* perhaps twelve in number, had a club meeting at the home of Sheila Solomon (around the corner and perhaps two blocks from Petitioner's home). After some refreshments and dancing, the meeting broke up at approximately 9:00 p.m.

Monica Hardy, age 16, lived at 16701 Lomond Boulevard, two houses east of the property of Petitioner. She was at the club meeting and asked Sheila Solomon, her

sister, Pam, and her Aunt, Sandra Williams, to walk her home.

These four girls left the Solomon home, walked north on Linholm to the intersection of Lomond, turned the corner to the right, going east and proceeded to cross the street onto the sidewalk toward the Hardy residence.

Somewhere on the sidewalk in front of the Petitioner's home, they encountered the Petitioner. There was an exchange of words, some arguing about the girls walking on his tree lawn, but certainly no physical violence of any nature.

Mrs. Newbill, the Aunt of Monica Hardy, was in her upstairs bedroom, heard the commotion on the sidewalk out front, came downstairs, opened the door and told Monica to come inside. She also told the other girls to go home. At that point, the remaining three girls turned and headed back toward Linholm, or west on Lomond. The Petitioner followed them for a few steps and then turned and walked across his yard toward his house. Before he disappeared from view, *he turned and yelled* "I am going to kill someone tonight!"

Appellant then went back to his garage and got his 16 gauge shotgun, and from the glove compartment of his automobile, obtained at least three shells. He then headed toward the front of his property, and while walking, inserted one shell into the chamber of the shotgun and loaded it. (This was a single shot, hammer-action shotgun.) He then walked down his driveway toward the street to a large, tall pine tree in his front yard, stepped into the pine tree, turned to his right and aimed the gun in the direction of a group of girls who were at least one property away from him, on the sidewalk in front of the property just west of his house.

Petitioner fired one round into the group of girls, *immediately reloaded* his gun but continued to hide in the tree. He did not come out from the pine tree until the police arrived and ordered him to.

At the time the club meeting broke up, Angela Gray, Paula Cox and Respondent, Alison Pierre, left together. They proceeded to the home of Angela Gray, stayed there for a few minutes, and decided to go back to the Solomon home because Angela had forgotten something. They left the Solomon home and proceeded toward the corner of Linholm and Lomond, with the intention of going to Monica Hardy's house to ask her if she would walk with them to the Baskin Robbins Ice Cream Store. When they got to the intersection of Lomond and Linholm, they met Sheila Solomon, Pamela Solomon and Sandra Williams. A brief discussion was had by all at the corner and shortly they all turned and headed east on the north side of Lomond Boulevard, toward the Hardy home. It was at this time that the shot was fired, striking both the Appellee and Angela Gray.

With the exception of Monica Hardy, none of the girls mentioned, including the Respondent, either knew the Petitioner or had ever seen him before this particular evening. In addition, the *Respondent never did see the Petitioner* nor knew who he was until she testified during his criminal trial.

At the moment Respondent was struck by this shotgun blast, she was 67 feet 7 inches from the place where Petitioner was hiding in the tree.

There was no evidence whatsoever that anyone, with the exception of Petitioner, had any type of firearm or other dangerous weapon either visible or on their person at any time that evening.

Immediately before the shooting, as he came into view from the back of his property, Petitioner turned abruptly to his left, pointed the shotgun at Mrs. Newbill and Monica Hardy and said "I am going to kill someone tonight". They immediately ducked back into their house and the next thing they heard was a shotgun blast. Immediately after the shotgun blast, when Monica Hardy again looked out of her front door, the Petitioner turned again and pointed the gun toward her, but said nothing.

Two members of the Shaker Heights Police Department, who were immediately involved in apprehending the Petitioner, testified that, after they had given him his rights, and while in the cruiser on the way to the Shaker Heights Police Station, he stated "the children had been bothering him for months and *I had to get even with them*".

Respondent was 14 years of age at the time of this incident. She received almost the full impact of this blast. She had a multitude of penetrating wounds of the scalp, face, neck, shoulders, chest and abdomen. She was hospitalized twice and underwent surgery on two separate occasions. Her plastic surgeon, Dr. deWayne Richey, testified that as of the time of the trial, she had over 100 shotgun pellets imbedded in her body and that they were there permanently. He further testified as to the multitude of permanent disfiguring scars about her face, neck and chest. This young girl never knew what hit her or why it hit her. She was a totally innocent and unsuspecting pedestrian and will live with the effects of this mutilation for the rest of her life.

ARGUMENT

In a case of negligence and assault and battery, where defendant testifies that he wanted to fire a warning shot into his neighbor's lawn, that "I didn't want to hurt them", but "as I swung around it discharged accidentally", such testimony is entirely inconsistent and irreconcilable with the right of self-defense.

Petitioner, in his answer filed herein, set forth the affirmative defense of self-defense. However, during trial he testified on both direct and cross-examination that the gun discharged "accidentally". The following is taken directly from the Record herein:

> ". . . I wanted to fire a warning shot into the neighbor's lawn to let them know that I was armed because I didn't want to hurt them. So, as I swung the gun around, it discharged accidentally."
>
> ". . . I realized what had happened and I was so shocked at the fact that the gun had gone off. . ."

It has long been the settled law of Ohio that self-defense and accident are inconsistent defenses. In *State v. Champion,* 109 Ohio St. 281 (1924), this Court held, beginning at page 286, that:

> "The very fact that requests were asked both on accidental homicide and self-defense, under the same evidence, presents a most peculiar paradox—a direct contradiction in terms and truth. Self-defense presumes intentional willful use of force to repel force or escape force. Accidental force or shooting is exactly the contrary, wholly unintentional and unwillful. . ."

> "If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law or legerdemain is he entitled to both."

When Petitioner *abandoned* the defense of self-defense and testified at trial that the shooting was accidental, that he did not intend to shoot at the girls, and that the gun went off accidentally, he cannot now complain that the Trial Court took the issue of self-defense from the jury.

CONCLUSION

The Ohio Court of Appeals held at page 11 of its Opinion:

> "We have carefully reviewed the Record in the instant case and conclude that the Trial Court properly directed a verdict for Appellee as to the issue of liability. The Record *conclusively* demonstrates that Appellant assaulted Appellee and was guilty of negligence and that the assault and negligence were the proximate cause of Appellee's injuries. . ."

Petitioner was represented in the trial of this case by competent, outstanding trial counsel. The verdict reflects their outstanding job, particularly in view of the nature and extent of Respondent's injuries and the permanent disfigurement of her mind and body. The Opinion of the Court of Appeals was unanimous. There is no error in this Record whatsoever. There are certainly no constitutional issues involved.

For these reasons, we respectfully submit that the Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

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